Workplace Safety and Insurance Appeals Tribunal

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Tribunal d'appel de la sécurité professionnelle et de l'assurance contre les accidents du travail

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Ontario

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Quarterly Production and Activity Report

July 1 to September 30, 2006

Production Summary 2
Production Charts 3
Communications 5
Judicial Review Summary 5
Recent Decisions 8

Production Summary

- The active inventory totalled 5,493 (37% over the target of 4,000 cases).

- Incoming appeals numbered 1,088; of these, 904 were appeals from WSIB decisions and 184 appellants advised they were ready to proceed to hearing following a period of inactive status.
  - This compares to 988 new appeals and 136 reactivated appeals recorded in the second quarter of 2006.
  - In the 3rd quarter of 2005 the Tribunal recorded 812 new appeals and 244 re-activations.
  - In 2005, the weekly average of hearing ready appellants was 65. For Q3 2006, the weekly average of hearing ready appellants is 67. This figure excludes cases reactivated from inactive status.

- Dispositions numbered 1,085; this includes 428 dispositions in the pre-hearing areas resulting from dispute resolution (ADR) efforts and 657 after hearing dispositions; of the after hearing dispositions, 634 followed from Tribunal decisions. In the 3rd quarter of 2005, 507 dispositions followed from Tribunal decisions and in the 3rd quarter of 2004, 536 dispositions followed from Tribunal decisions.

- The inactive inventory decreased by 47 cases to 4,302 (at the end of Q2-06, inactive inventory was 4349 cases).

- In Q3 2006, 77% of final decisions were released within 120 days. To date in 2006, 81% of final decisions were released within 120 days.

- The Appeals Tribunal remains unable to offer hearing dates within four months of the appellant confirming hearing readiness by filing a Confirmation of Appeal form. Recent appointments and re-appointments will enable an increase in the hearing schedule to address the volume of cases.

The Tribunal's Notice of Appeal (NOA) process places responsibility in the hands of the parties and representatives to advance a case, and requires appellants to confirm their readiness to proceed (by filing a Confirmation of Appeal) with their appeals within two years of completing the NOA.

The NOA inventory includes cases that would previously have been closed as inactive by Tribunal intervention. These "dormant" cases are currently being tracked as part of the Tribunal's case management. Many are expected to close as abandoned appeals after a two-year period expires. At the end of the third quarter of 2006, the notice inventory included 1,308 dormant cases, the active inventory totaled 5,493 cases, and the inactive inventory totaled 4,302 cases.

Production Charts

A. Active Inventory

Period	Active Inventory
Q1-2005	5156
Q2-2005	5351
Q3-2005	5378
Q4-2005	5288
Q1-2006	5319
Q2-2006	5417
Q3-2006	5493

B. Incoming Appeals

Period	Incoming Appeals
Q1-2005	1122
Q2-2005	1198
Q3-2005	1056
Q4-2005	1100
Q1-2006	1144
Q2-2006	1124
Q3-2006	1088

C. Dispositions

Period	Dispositions – total	Pre-hearing	After Hearing
Q1-2005	1136	456	680
Q2-2005	1048	416	632
Q3-2005	1016	479	537
Q4-2005	1190	465	725
Q1-2006	1146	435	711
Q2-2006	1131	476	655
Q3-2006	1085	428	657

D. Inactive Inventory

Period	Inactive Inventory
Q1-2005	4190
Q2-2005	4243
Q3-2005	4237
Q4-2005	4286
Q1-2006	4309
Q2-2006	4349
Q3-2006	4302

E. Notice of Appeal (Dormant cases)

Period	Total Dormant	Change from previous quarter
Q1-2005	1551	20
Q2-2005	1506	-45
Q3-2005	1519	13
Q4-2005	1519	0
Q1-2006	1486	-33
Q2-2006	1381	-105
Q3-2006	1308	-73

The Tribunal inventory includes cases that would previously have been closed as inactive by Tribunal intervention. These "dormant" cases are tracked as part of the Tribunal's case management.

Community Outreach

The Tribunal's Advisory Group met in July. The group is comprised of representatives from the worker and employer stakeholder communities. Issues on the agenda included challenges and strategies for new appointees and a caseload update.

Dan Revington, General Counsel, Ann Somerville, Associate Counsel to the Chair and Susan Adams, Counsel, Special Projects, continue as members of the Ontario Bar Association's workers' compensation section executive; Ann Somerville is also a member of the Public Lawyers section executive; and Carole Prest continues as president of the administrative law section executive.

Dan Revington and Nicole Bisson, Manager, Early Review presented a session about the Tribunal at the Schedule 2 employers' conference. The conference took place on September 27, 2006.

Marsha Faubert, Tribunal Director, is participating on the organizing committee for the Conference of Ontario Boards and Agencies ("COBA"). This annual conference is held in early November.

Judicial Review Activity

The status of applications for judicial review involving the Tribunal in the third quarter of 2006, as well as the status of a court action, are set out below. Only those judicial reviews where there was some significant activity during the quarter are listed. There are a number of other pending judicial reviews which were received after the completion of this quarter, or for which no action occurred during this particular quarter.

Judicial Reviews

1. Decisions Nos. 433/99 (June 24, 1999) and 433/99R (May 30, 2000)

The Applicant worker had a back injury in 1979. From 1979 until 1990, a period of almost eleven years, there were no records of back complaints. In 1993 the worker alleged that his back pain was related to the 1979 accident. The Vice-Chair found the 1979 accident did not cause the symptoms in 1990 and denied entitlement for a back disability.

The worker commenced an application for judicial review on the grounds the Tribunal's decision failed to address the report of an orthopedic surgeon that was favourable to the worker's appeal. The judicial review is scheduled to be heard in Sudbury in October.

2. **Decisions Nos. 653/99 (November 15, 1999) and 653/99R (January 21, 2002)**

The Tribunal denied the worker's appeal for an increased future economic loss award and for non-economic loss, on the grounds that the worker's medical condition was caused by non-compensable factors. The worker delayed more than three years before bringing the application for judicial review.

Counsel for the employer moved to quash the judicial review for delay. The motion was scheduled to be heard in October in Ottawa. However, counsel for the worker advised that the worker would consent to having the judicial review dismissed. At the end of the quarter the Tribunal was waiting to receive a copy of the order dismissing this application for judicial review.

3. **Decisions Nos. 1402/03 (January 19, 2004) and 1402/03R (August 19, 2005)**

An injured worker had his benefits based upon the actual wages his employer paid him. The worker alleged that the wages that were paid were too low, and that under the collective agreement he should have been paid by the employer at a higher rate. The Tribunal held that it did not have the jurisdiction to interpret a collective agreement, and whether the correct wages were paid was a Labour Relations matter. The worker had not sought a remedy under the collective agreement. The Tribunal found that the amount the worker was paid was the amount to be used in the calculation of benefits, and the Tribunal did not have the jurisdiction to consider what should have been paid.

The worker commenced an application for judicial review of the Tribunal's decisions. At the end of the quarter the Tribunal was awaiting the worker's factum.

4. **Decision No. 855/03 (November 15, 2005)**

The worker was a member of a union. Pursuant to the collective agreement, the employer made contributions on the worker's behalf to a benefit plan that provided health and dental care coverage, as well as pension plan coverage. The employer's contributions were based on the hours worked by the worker. Under the terms of the contract, part of the contributions were used to continue the worker's benefits and pension contributions for up to a year after an injury.

The worker was injured and alleged that the employer's contribution to his benefits should be included in the calculation of his earnings for the purposes of workplace safety and insurance benefits. The worker's appeal was denied. The Vice-Chair held that Board policy did not include benefit payments and pension plans in earnings basis. There was no direct relationship between the

employer's contributions and the benefits the worker received. Workers could not receive a refund or return of the employer's contributions. The Vice-Chair also held that the Legislature did not intend to include contributions from all employers in Ontario in the earnings of workers, or that some workers would receive non-taxable income.

The worker has commenced an application for judicial review. At the end of the quarter the Tribunal was preparing its factum.

5. Decisions Nos. 172/02I (February 28, 2002), 172/02 (September 22, 2003) and 172/02R (June 30, 2004)

In January 1995 a worker injured his elbow and back. He received a non economic loss award for his back and elbow. He also received total disability benefits from the date of the accident until early 1996, when his benefits were terminated for failing to accept suitable work. The Board reinstated his wage loss benefits effective December 2001, and awarded a 100% future economic loss award in April 2003.

The worker appealed to the Tribunal for entitlement for a psychotraumatic disability and for wage loss benefits from February 1996 to December 2001. In Decision 172/02 the Vice-Chair granted entitlement for a psychotraumatic disability, but found the worker was not totally disabled until July 1999. The worker's application to reconsider was granted in part in Decision 172/02R, allowing the temporary total disability benefits to be further backdated to September 9, 1998. A further request to reconsider for the period benefits were denied was dismissed. The worker has now commenced an application for judicial review. At the end of the quarter the Tribunal was waiting for the worker's factum.

6. Kamara v Workplace Safety & Insurance Appeals Tribunal

An injured worker's appeal was denied by a decision of a panel of the Tribunal. The worker, who is self-represented, commenced an action to sue the Vice-Chair of the Panel for a million dollars. The grounds for the action are not clear. The Tribunal filed its statement of defence, and served a motion to dismiss the action. The motion is scheduled to be heard in October.

Recent Decisions

Board policies – applicability of Board policy
Retroactivity – policy change

Decision No. 1608/05 discusses whether Board *Operational Policy Manual* Document No. 18-01-08 (now 15-06-02) applies retroactively. The policy was adopted in 2003 and discusses entitlement to loss of earnings (LOE) benefits following work disruptions (short-term and long-term lay-offs). In this case, the issue was whether the worker was entitled to LOE benefits when the plant was closed for its annual shutdown from July 3 to 17, 2000. Since the period in question occurred before the policy was adopted in 2003, the issue was whether the policy could be applied retroactively.

The Vice-Chair held that the Tribunal was not bound to apply the policy since it was adopted after the period in question. The policy, however, could be used as a guideline since there was no prior policy dealing specifically with the issue of LOE benefits during short-term and long-term lay offs.

Human Rights – discrimination – family status
Expenses – child care

Decision No. 2122/04 looked at the issue of whether the worker was entitled to child care expenses while the worker was attending school as part of an LMR program. The worker raised the issue that the failure to pay for child care expenses was a violation of the *Human Rights Code* provision for equal treatment without discrimination based on family status.

The Panel found that the intent of Board policy on LMR expenses set out in OPM Document # 19-03-06 is to pay necessary expenses directly related to attending school and not personal expenses. The Panel held that child care expenses are a normal personal expense of working and not expenses that employers generally cover. The aim of workers' compensation is to put workers in the same position they would have been if they had not been injured, but not in a better position.

The current Board policy does not address child care expenses and seems to be a policy issue for the Board to consider in their role as creators of policy. The Panel also cited *Symes v. Canada* [1993] 4 S.C.R. 695 which held that it was not a Charter violation when the *Income Tax Act* did not permit the deduction of child care expenses as a business expense.

The Panel found that the worker's representative made superficial submissions on the *Human Rights Code* however, the representative made no specific submissions regarding the Tribunal's jurisdiction or previous Tribunal caselaw that found that periodic payments (including workers' compensation supplements) were excluded from the definition of services in the *Human Rights Code*. In the circumstances, the Panel was

unable to conclude that the worker was entitled to child care expenses while attending school as part of her LMR plan.

Waiver – right to compensation – mediation
Environmental hypersensitivity

Decision No. 2227/05 looked at whether a worker was entitled for multiple symptoms which the worker related to exposure to fiberglass and dust in the workplace. The Panel held that it was unnecessary to determine whether the worker suffered from environmental sensitivity or sick building syndrome. The Panel was satisfied that the worker's symptoms were related to her workplace exposure.

In this case, the worker resigned from employment in 2001 due to a mediated settlement by the Canadian Human Rights Commission. The Panel held that the settlement did not bar the worker's right to workplace insurance benefits. Under s. 63 of WSIA, a worker can only waive the right to benefits in return for a specified amount from the employer when the Board approves the settlement.

October 2006